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No. 172

In the Supreme Court of the United States

OCTOBER TERM, 1951

ERIC G. KAUFMAN AND AENNI C. KAUFMAN,
PETITIONERS

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A., ETC., J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, GEORGIA NEESE CLARK, TREASURER OF THE UNITED STATES, AND REMINGTON RAND, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS, J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, AND GEORGIA NEESE CLARK, TREASURER OF THE UNITED STATES

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OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Columbia on

the denial of petitioners' original motion (R. 33) is reported at 90 F. Supp. 1011. The memorandum opinion on denial of the amended motion (R. 74) is unreported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 79-81) is reported at 188 F. 2d 1017.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on April 5, 1951 (... 82). The petition for a writ of certiorari was filed on July 3 and was granted October 15, 1951 (R. 86). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioners, nonenemy stockholders, seek to intervene in an action brought by their corporation against the Alien Property Custodian for the return of vested assets of the corporation. The following questions are presented:

1. Whether the corporation has any right or duty to present a cause of action for a portion of the corporate assets, for the benefit of nonenemy stockholders, so that where the corporation has failed to present the cause, petitioners may present it in the right of the corporation;

2. Whether the nonenemy stockholders have a recoverable interest in assets vested from their corporation;

3. Whether, with respect to their asserted interest, the stockholders may be "bound" by the judgment in an action for return brought by the corporation, within Federal Rule of Civil Procedure 24(a)(2), or may be "adversely affected" by a disposition of property in which they have an interest, within Rule 24(a)(3), and thus may intervene in the corporation's action as of right;

4. Whether the stockholders have a cause of action, or a right to intervene to present a cause of action, to enjoin an impending settlement between the Custodian and the corporation pursuant to which payments would be made to the corporation for the benefit of all of its stockholders.

STATUTES INVOLVED

Rule 24(a) of the Federal Rules of Civil Procedure and the pertinent sections of the Trading with the Enemy Act are set out in the Appendix, p. 52, *infra*.

STATEMENT

Societe Internationale Pour Participations Industrielles et Commerciales S.A., etc. (I.G. Chemie), a Swiss corporation, brought an action against the Attorney General[1] in the United States District Court for the District of Columbia under

[1] By Executive Order No. 9788 (Oct. 15, 1946, 11 F.R. 11981), the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this brief, the term "Custodian" will be used to refer either to the Alien Property Custodian or to the Attorney General as his successor. The Treasurer of the United States is a nominal defendant.

Section 9(a) of the Trading with the Enemy Act (Appendix, p. 54, *infra*), for the return of vested property (R. 1-15). The property sued for is over 90% of the stock of General Aniline & Film Corporation, of Delaware, which the plaintiff alleges to be worth more than $100,000,000, and bank accounts totalling over $1,800,000. The complaint alleges, in essence, that the corporation is the owner of the property and is not an enemy within the meaning of the Trading with the Enemy Act. The answer filed by the Custodian (R. 15-30) denies that the plaintiff corporation is the owner and denies that plaintiff is not an enemy; as a defense it alleges that between 1928 and 1945 plaintiff and others engaged in a world-wide conspiracy to cloak assets of I.G. Farbenindustrie, Germany.

Petitioners allege that they are nonenemies and own 86 shares[2] of the some 300,000 outstanding shares of capital stock of I.G. Chemie. On March 9, 1950, they filed suit against the Custodian in the United States District Court for the Southern District of New York under Section 9(a) of the Trading with the Enemy Act (R. 83-6). They sought the return to them of a share of the vested assets equal to the proportion of their stockholdings in the corporation (R. 85-86). A motion to

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[2] Petitioners' reference to 11,000 shares (Brief, p. 3, n. 6, pp. 8-9) rests on an affidavit filed the day before the district court's judgment, in which a Swiss citizen affirms that persons holding 11,000 shares "intend" to become parties or to intervene "independently" (R. 71).

dismiss for failure to state a cause of action was denied on October 5, 1950, without opinion. *Kaufman* v. *McGrath,* S.D.N.Y. Civ. No. 56-246.

Shortly after filing their suit in New York, petitioners, on March 14, 1950, filed in the District Court for the District of Columbia a motion to intervene in the pending action by the corporation against the Custodian. After the denial of the motion on May 24, 1950 (R. 33-35), petitioners filed an amended motion for leave to intervene (R. 44) and an amended proposed complaint, brought for themselves and for all stockholders of I.G. Chemie similarly situated, and, the corporation having refused to sue, in the right of the corporation. Petitioners alleged that they, personally, are nonenemies and holders of 86 shares of I.G. Chemie having a current market value of about $15,000, that the corporation is a nonenemy to the extent it is owned by nonenemies, that the corporation is entitled to a return of the portion of the vested assets equal to the percentage of the stock in the corporation held by nonenemies, such portion to be returned for the exclusive benefit of the nonenemy stockholders (R. 47-57, 67). Separate counts seek to enjoin the corporation and the Custodian from settling the principal action (R. 57-67).

Petitioners' amended motion for leave to intervene was denied in an opinion and an order dated June 30, 1950, the trial court reading a memo-

randum opinion from the bench (R. 73-76). The Court of Appeals affirmed, holding that petitioners are not entitled to intervene under Federal Rule of Civil Procedure 24(a)(2) because, in their absence from the suit, they could not be deprived of their claimed right to a share of the assets and thus would not be "bound" by the judgment; that they have no right to intervene under Federal Rule 24(a)(3) because as stockholders they do not have a recognizable interest in the property vested from the corporation; and that the corporation has no standing to assert an interest claimed by its stockholders, the petitioners (R. 80-81).

ARGUMENT

Introduction and Summary

The petitioners, nonenemy stockholders in the plaintiff corporation, seek intervention as of right to present a cause of action for that part of the assets vested from the corporation equal to the percentage of nonenemy stockholders in the corporation. The right to intervene is grounded upon an asserted corporate right and duty to sue, yet the return which is demanded is a return to the nonenemy stockholders of their interest in the assets.

Intervention as of right is sought under two separate clauses of Federal Rule 24(a) (Appendix, p. 52). It is urged that under clause (2) petitioners may be bound by the judgment given in their absence and that under clause (3) they will be ad-

versely affected by the disposition of the property made in their absence from the suit. In opposition, the Custodian makes two main contentions. Acceptance of either disposes of both grounds on which intervention is sought.

Our first point (p. 10, *infra*) is that there is neither corporate right nor duty to bring a suit for the benefit of the nonenemy stockholders in the corporation. A corporation owes no duty to a few of its stockholders to litigate for their personal benefit. Especially is this true where the interests of the few conflict with the interests of all the stockholders, who would be the beneficiaries of the total recovery sought by the corporation. Even if the corporation would, it could not sue for the nonenemy stockholders. The Trading with the Enemy Act requires suit to be brought by the real party in interest. This Court has held that a corporation has no standing to assert against the Custodian the rights of its stockholders. *Silesian-American Corp.* v. *Clark*, 332 U. S. 469.

It follows that petitioners will not be bound by the judgment given here and thus that they have no right to intervene under Federal Rule 24(a)(2). If nonenemy stockholders have a right to a share of the assets proportionate to the stock they hold, that right will not be determined by this suit, for it will not be in issue. They may bring a separate suit to establish that right, as petitioners have individually done in a suit for their own proportionate share filed in the Southern District of New York.

From the conclusion that the corporation cannot raise the rights of its nonenemy stockholders, it follows, too, that there is no right to intervene under clause (3) of Rule 24(a). For petitioners will not be "adversely affected" by the progress and conclusion of this suit. In this suit the court will dispose only of the corporation's right to a return of all the property, for the benefit of the corporation and of all its stockholders. The outcome here can affect the nonenemy stockholders only favorably. To the extent that the corporation recovers part or all of the property, the recovery will reduce the indirect loss to all stockholders, including petitioners, caused by the vesting. To the extent that the corporation does not recover, the property remaining in the Custodian's hands will be available to satisfy any judgment that stockholders may obtain in individual actions.

Our second point (p. 20, *infra*) is that the nonenemy stockholders have no recoverable interest in the property vested from their corporation, no matter whether they or the corporation bring the suit for their benefit. The property was vested from the corporation as that of an enemy. By Section 9(a) only those who have an "interest" in the property may have a return. Stockholders have no interest in the corporate assets, by the terms and scheme of the Act and by general principles of law. This point is discussed at length below; but the Court need reach it only if it holds, contrary to our first contention, that the corporation has the right

and duty to bring suit for the nonenemy stockholders. If reached, however, the lack of interest also disposes of the claim to intervention under both clause (2) and clause (3) of Rule 24(a). The judgment will bind the stockholders only as to their indirect economic interest in the amount which the corporation is seeking to recover and thus Rule 24(a)(2) is unavailing. Rule 24(a)(3) is equally closed to them because they have no interest in the property being disposed of and thus can suffer no adverse effect.

Petitioners also seek an injunction against a settlement of the action by the corporation and the Custodian. They argue that a settlement would prejudice their rights and would, moreover, be illegal under the Trading with the Enemy Act. The claim of prejudice to the rights of nonenemy stockholders is disposed of if the corporation has no status to sue for the stockholders (Point I) or if the nonenemy stockholders have no interests for which any suit can be brought (Point II). If the claim of prejudice fails, then petitioners have no standing to attack the legality of any settlement. In any event, the claim of illegality lacks merit. It rests on the fact that 11% of the stockholders in plaintiff are admitted to be enemies and upon an alleged policy of the Act against any monies going to corporations in which there are enemy stockholders. But nothing in the Act or in public policy precludes avoidance of the delays and expense of litigation by settlement; indeed the law favors set-

tlements. Moreover, while the power to settle is not restricted by the limitations on administrative returns, it is suggestive that even an administrative return may be made to a corporation 49% of whose stockholders are enemies (Section 32(a)(2)).

For convenience in exposition we shall discuss first the two issues which involve corporation and trading-with-the-enemy law—whether a corporation has any cause of action on behalf of some, but not all, of its stockholders (Point I), and whether stockholders have any legally recognizable interest in the assets vested from their corporation (Point II). In the light of that discussion, we shall then consider whether Rule 24 gives petitioners any right to intervene in this action (Point III). Finally, we shall deal with the special problems presented by their attempt to enjoin a settlement (Point IV).

I

The Corporation Has No Right or Duty to Press a Claim for Its Nonenemy Stockholders

Petitioners are seeking recovery for themselves and other nonenemy stockholders of a share of the vested corporate assets equal to the percentage of stock held by the nonenemies. They take the position that the corporation has the duty to bring such a suit and that, since it has failed to do so, they may intervene in the corporate right to perform the corporation's duty. We submit that there is no such corporate duty and that therefore peti-

tioners are not entitled to intervene to require it to be performed.

The proposed complaint alleges that plaintiff is entitled to a share of the assets proportionate to "the interests in plaintiff held by non-enemies." This portion is "to be returned to plaintiff for all proper corporate purposes, only excluding from the benefits thereof all interests ineligible to participate therein under the Trading with the Enemy Act" (R. 49-50). By persons "ineligible to participate," the complaint means enemy stockholders (R. 52); only the nonenemy stockholders are "eligible" (R. 53, 58, 59, 60, 62). The prayer is that the proceeds of the action be applied first "to the benefit of plaintiff's non-enemy shareholders, to the extent of their full interest in plaintiff" (R. 67). And in their brief petitioners explain that the judgment they seek would take the form of a return "to the corporate entity" of the proportionate non-enemy share, upon condition that the corporation submit a "plan" for limiting the benefits of the recovery to the nonenemy stockholders. This plan "might involve the creation of a preferred stock or debentures issuable to the non-enemy stockholders to the extent of their interest in the recovered assets," or a "liquidating dividend." If the corporation refused to submit such a "plan," the stockholders could do so or "the court might then order distribution directly to the non-enemy stockholders" (Pet. Br. pp. 42-3). Since the interest and

right which is thus being asserted is that of the nonenemy stockholders and the recovery is to go to them, it would seem only natural that those stockholders and not the corporation be the plaintiff. See Glenn, *The Stockholder's Suit—Corporate and Individual Grievances* (1924), 33 Yale L. J. 580, 582, 584, 588.

Why, then, do petitioners insist upon the corporate right of return, the corporate duty to sue, and intervention in the corporate right (Brief, pp. 4, 14, 15, 39, 45, 48)? The motive lies in their admission (Brief, p. 44) that if it is held that the corporation is not the proper party to sue for the nonenemy stockholders, and that the stockholders must sue on their own behalf, the stockholders whom petitioners seek to represent may be barred by limitations and by failure to file administrative claims pursuant to Section 33 of the Act (Appendix p. 61, *infra*).[3] The petitioners seek to create a new right to evade the running of limitations upon another right.

It is true that substantially no nonenemy stockholders in the plaintiff have filed an administrative

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[3] The Custodian does not concede that limitations have not run even if the corporation is the proper claimant for the nonenemy stockholders. The corporation neither filed a claim nor pleaded a cause on behalf of individual stockholders. Petitioners expect (Brief, p. 44), however, that this conclusion will not appear so clearly to the courts as would the plain fact that individual stockholders, not having filed a claim or brought a suit on their own behalf, may not do so after the permitted time has passed.

claim or brought suit under the Trading with the Enemy Act,[4] and that the time within which they may do so under Section 33 has run out. But petitioners themselves are not in this position of being barred by limitations. Admittedly conscious of the running of time, they filed a claim and brought suit in the district court in New York, both within the time prescribed by the statute (R. 32, 83-6, Brief, p. 11). Their concern over limitations thus stems from a solicitude for the other nonenemy stockholders who were not so diligent. These other nonenemy stockholders, incidentally, have slept for at least four years, having learned of their rights, according to petitioners (Brief, pp. 17-19, 44), on December 8, 1947, when this Court decided

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[4] Indeed, the nonenemy stockholders in all the corporations whose assets have been vested have paid scant attention to any possible "interest" they may have in the vested assets. Only three suits, in addition to petitioners' suit in New York, have been filed. Fritz von Opel, asserting a share interest in Uebersee Finanz-Korp., has brought suit in the Southern District of New York and in the District of Columbia. *Fritz von Opel* v. *McGrath*, S.D.N.Y. Civ. 50-70; *von Opel* v. *Clark*, D.D.C. Civ. Action No. 1910-49; *von Opel* v. *Clark*, D.D.C. Civ. Action No. 1923-49. In two other cases, the corporations involved did not file suit, and a nonenemy stockholder in each of them has sought to raise directly his alleged right to an aliquot share of the corporate assets. *Bank Waedenswil* v. *McGrath*, D.D.C. Civ. Action No. 1902-49; *Theising* v. *McGrath*, D.D.C., Civ. Action No. 1903-49.

With the exception of Uebersee Finanz-Korporation (see No. 178, this Term), no corporation, of all those whose assets have been vested, has filed a claim or brought suit raising a question of a right to a return of an interest proportionate to its nonenemy stockholdings, whether for the benefit of the corporation or the nonenemies. Uebersee's claim is really not for partial but for total recovery. See respondent's brief in No. 178, pp. 60-1.

Clark v. *Uebersee Finanz-Korp.*, 332 U. S. 480. But even if those others who failed to file and sue were deserving of sympathy, nothing is plainer than that the corporation cannot be made into their plaintiff in order to circumvent for them the statute of limitations.

In support of their theory that the corporation has the duty to sue on behalf of the nonenemy stockholders, petitioners urge (Brief, pp. 41, 43) that a contrary conclusion would mean a "multitude" of individual suits. This is at most an argument of convenience and not of law; it is, moreover, not well grounded even as a matter of convenience. The fact is that no stockholder of plaintiff corporation other than petitioners has filed suit and only four suits, including petitioners' suit in New York, have been brought by stockholders in all the corporations whose assets have been vested (see p. 13, n. 4, *supra*). And, in any event, the issues in such suits would not be common to the various plaintiffs. Aside from the common issue of law basic to all of them, an issue capable of decision once for all, the "multitude" of suits will each present the issue of the enemy taint of the individual stockholder-plaintiff. It will be far better that these different, factual issues be heard separately.

According to the petitioners, it is only the men who dominate this corporation and own a majority of its stock and refuse to admit that they are enemies, who prevent the corporation from doing

its "fiduciary duty" and suing for the benefit of the nonenemy stockholders. Yet petitioner would impose this duty to sue even if the majority believe in good faith that they and the corporation are not enemies and that suit should be brought for return of all the property. Were the corporation required to sue both for itself for all the property, and for its nonenemy stockholders for part, the resulting dual loyalties would affect the daily conduct of the lawsuit. When settlement came up for consideration, as is the case here, the separate duties would squarely conflict and put the corporation in an impossible position.

It is no answer that persons such as petitioners are glad to intervene and relieve the corporation of its "fiduciary duty" to sue for the nonenemies. Such a duty cannot exist and there is no occasion for intervention to perform it. No corporation can owe a duty to a few of its stockholders which conflicts with the duty it owes to all. Petitioners themselves allege that the corporation "has a legal obligation to speak for plaintiff's enemy and nonenemy stockholders alike" (R. 60).

If there is an interest in the stockholders (and we say there is none, see pp. 20-36, *infra*), it must be asserted by them in their own name and behalf and not through the corporation as their agent or representative. Section 9(a) of the Trading with the Enemy Act requires suit by the real party in interest. Thus, it has been held that an Ameri-

can trustee of a fund established by a German company has no standing vicariously to assert the interests of American creditors of the German company; the creditors have their own remedy under the Act. *Farmers Loan & Trust Co.* v. *Hicks*, 9 F. 2d 848, 850 (C.A. 2), certiorari denied, 269 U.S. 583. And a bailee may not assert the rights of the owner of vested property. *Nagano* v. *Clark*, 85 F. Supp. 368, 374 (N.D. Ill.), reversed on other grounds, 187 F. 2d 753 (C.A. 7). Similarly, the holder of a bare record title who has no beneficial interest has no interest in the property capable of being recovered in a suit against the Custodian. *Fujino* v. *Clark*, 172 F. 2d 384 (C.A. 9), certiorari denied, 337 U.S. 937; *Standard Oil Co., N. J.* v. *Markham*, 64 F. Supp. 656, 666 (S.D.N.Y.), affirmed, 163 F. 2d 917 (C.A. 2), certiorari denied, 333 U.S. 873. *Central Hanover Bank & Trust Co.* v. *Markham*, 68 F. Supp. 829 (S.D.N.Y.).[5]

[5] These decisions apply to litigation under the Trading with the Enemy Act the general rule that the proper plaintiff is the person who will benefit from the suit. *McMicken* v. *United States*, 97 U.S. 204, 208. And to determine the "real party in interest" the courts will look to the substance of the matter. *Heiskell* v. *Mozie*, 82 F. 2d 861, 863 (C.A. D.C.). A situation analogous to the instant case is presented when a corporation seeks to sue for a refund of taxes erroneously assessed on a distribution of capital. Since the recovery is destined for the stockholders, it is they and not the corporation who are the proper plaintiffs and must bring the suit. *Sharp & Dohme* v. *United States*, 144 F. 2d 456 (C.A. 3). Cf. *Turks Head Club* v. *Broderick*, 166 F. 2d 877 (C.A. 1); *Royce* v. *Squire*, 168 F. 2d 250 (C.A. 9). Conversely, when the relief sought is entirely a corporate benefit, such as exemption from a regulatory action, the stockholder has been denied status as plaintiff. *Schenley Corp.* v. *United States*, 326 U.S. 432; *Pittsburgh & W. Va. Ry. Co.* v. *United States*, 281 U.S. 479.

This Court has decisively applied the real-party-in-interest rule to the Trading with the Enemy Act. In *Silesian American Corp.* v. *Clark*, 332 U.S. 469, a corporation attempted to assert under the Act an alleged interest of its stockholders. The attempt was rebuffed by a unanimous court in an opinion by Mr. Justice Reed, who wrote (332 U.S. at 474):

> It was held by the Circuit Court of Appeals that Silesian had no "standing vicariously" to assert the interests of its shareholders. We agree. Silesian has no legal interest in the issue as to the ownership of its stock.

Just as a corporation has no standing to assert rights of some of its stockholders' pledgees against the Custodian, it has no standing to assert the rights of some of its stockholders against the Custodian. This is so, even if the rights of the stockholders are not in derogation of the corporation's rights. It is doubly improper to suggest that the corporation be plaintiff, where, as here, the non-enemy stockholders' claim is in conflict with the claim of the corporation and with the interests of the other, enemy stockholders.

The square conflict between the petitioners' claim and that of the corporation is demonstrable by the pleadings filed on behalf of the two. By Section 9(a) "any person not an enemy" may bring a suit. Since the section embodies the consent of the United States to be sued, a clear allegation that a plaintiff is a nonenemy is jurisdictional.

Garvin v. *Kogler*, 272 Fed. 442 (C.A. 3). The plaintiff corporation has complied with the statutory requirement by unqualifiedly alleging that it is not an enemy, an ally of an enemy, nor a national of a designated enemy country (R. 2; see *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 482). Petitioners must plead similarly, for where a corporation has a right to sue, under the Trading with the Enemy Act (as elsewhere) "a stockholder suing in its right, is in no better position." *Stoehr* v. *Wallace*, 255 U.S. 239, 251. Petitioners are fully appreciative of the necessity that the corporation must unqualifiedly plead its nonenemy status (R. 49; Brief, pp. 5, 40, n. 18). And they are quite capable of pleading plainly that they, individually, are not enemies (R. 48[6]). Yet, they carefully qualify their allegation of the corporation's status. They allege that the plaintiff corporation "is not now and has not been" an enemy "at least to the extent that the plaintiff represents non-enemy interests, that is to say, at least to the extent plaintiff has been, since December 6, 1941, and is now owned by non-enemies" (R. 48, para. 3). This

[6] "Intervenors are residents of the City, County and State of New York and are now and have been at all times since December 6, 1941, non-enemies. The term 'enemy' as used in this complaint means enemies, enemy nationals, allies of enemies, nationals of allies of enemies, nationals of a designated enemy country, or nationals of Germany or Japan, within the meaning of the Trading With the Enemy Act, as amended, and corporations or other persons directly or indirectly owned or controlled by or affiliated with an 'enemy', and the term 'non-enemy' means the absence of such status." (R. 48, para. 2).

is an allegation that the corporation is partly enemy. It is thus contradictory of the corporation's own allegation. We do not offer this point so much to show that petitioners' complaint in the corporate right is subject to a motion to dismiss as admitting that the corporation is an enemy,[1] but rather to show that petitioners' position is contrary to that of the corporation. As such, it cannot be presented by the petitioners in the corporate right.

The essence of the matter is that the corporation's cause of action to recover all the property for the benefit of the corporation (and indirectly for all the stockholders), is plainly contradictory of the petitioners' cause of action for part of the property for the benefit of only the nonenemy stockholders. The cause on behalf of the corporation rests on the proposition that the corporation is not an enemy. The cause on behalf of the nonenemy stockholders rests on the proposition that the corporation is an enemy and goes on to allege that individual stockholders are not enemies and have a legal interest. The corporation can prosecute only the cause for its behalf; the stockholders must prosecute the cause for their behalf, as the petitioners have done in New York.

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[1] This is, however, the case. *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 482; *Garvin* v. *Kogler*, 272 Fed. 442 (C.A. 3); *Rothschild* v. *Chemacid Societe Anonyme*, 266 App. Div. 1017, 267 App. Div. 773, 44 N.Y.S. 2d 689 (2d Dept.).

II

Petitioners, Stockholders in Plaintiff Corporation, Have No Legally Recognizable Interest in the Assets Which Have Been Vested from the Corporation

We have shown that the nonenemy stockholders must themselves bring suit for any interest they would seek. We submit, moreover, that they have no interest in the assets which could be recovered, whether by intervention or by separate suit.

At the time of the vesting in 1942, the property in issue was on the face of things the property of the corporation. The vesting was intended to, and did take the property "as completely as though by conveyance." *Commercial Trust Co.* v. *Miller*, 262 U.S. 51, 56; *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 120. Nowhere in the situation existing at the time of vesting or thereafter was there room for interposition of persons such as petitioners, minority stockholders in the corporation. While Section 9(a) (Appendix p. 54, *infra*) broadly authorizes suits for "any interest,"[8] an

[8] Since the "interests" for which suit may be brought are all-inclusive there can be no constitutional question, for if petitioners have an interest in the vested property, the Act gives them a full and adequate remedy. The Act is designed "to give to citizens and alien friends an adequate remedy for invasions of their property rights." *Becker Co.* v. *Cummings*, 296 U.S. 74, 81; see *Stoehr* v. *Wallace*, 255 U.S. 239, 243, 246. Petitioners' argument from the Constitution (Brief, pp. 13-14, 25, 37-8) begs the question whether their alleged interest is one which is entitled to constitutional protection and merely asserts that property interests are entitled to such protection. The question is, of course, whether petitioners have a property interest.

interest must exist before it can be recovered. This the petitioners do not have.

It is elementary law that stockholders, majority or minority, do not own the assets of the corporation or have any "interest" in them. "The corporation is a person and its ownership is a non-conductor that makes it impossible to attribute an interest in its property to its members." *Klein* v. *Board of Supervisors*, 282 U.S. 19, 24. The rights of stockholders are limited to a right to dividends and to a share on dissolution, but they do not in any way own the corporate assets during the existence of the corporation. *Rhode Island Trust Co.* v. *Doughton*, 270 U.S. 69; *Van Allen* v. *The Assessors*, 3 Wall. 573, 584.

So a stockholder, though he be the sole stockholder, may not sue for or recover any property or interest, the title or ownership of which is in the corporation. *Green* v. *Victor Talking Mach. Co.*, 24 F. 2d 378 (C.A. 2), certiorari denied, 278 U.S. 602; *Hill* v. *Fidelity & Deposit Co. of Maryland*, 44 F. 2d 624 (N.D. Ga.); *Brannan* v. *Kelley*, 83 Ind. App. 250, 148 N.E. 157; *Button* v. *Hoffman*, 61 Wis. 20, 20 N.W. 667; *In re Condemnation of Land for Spring Valley Park*, 57 S.W. 2d 752, 754 (Mo. App.); 13 Fletcher, *Cyclopedia of Corporations* (Perm. Ed.) Secs. 5923, 5926.

Petitioners, in presenting their case for an interest in the stockholders, first seek to give the impression that the Custodian's allegations are directed exclusively to the enemy character of the

majority stockholders in the plaintiff and that the case thus turns on a distinction between the majority enemy stockholders and the minority nonenemies (Pet. Br. pp. 3, 5-6, 7, 12, 15, 17). This is not the case. Among the reasons for vesting was that the vested property was found to be owned or controlled by I. G. Farben, a German corporation. Vesting Order No. 907, 8 F.R. 2453. Plaintiff has alleged in its complaint that it is not an enemy and that it was the owner of the property for which suit is brought. The Custodian's answer denies both allegations and thus raises both the issues of plaintiff's ownership of the property and plaintiff's enemy status (R. 16, pars. 3, 4; R. 2, pars. 3, 4). The Custodian, in addition, affirmatively alleges that the plaintiff has conspired with I. G. Farben and others to cloak Farben's property in many countries of the world (R. 28-30). The evidence will go to the issues whether plaintiff owned the vested property and whether plaintiff is an enemy or enemy-tainted by reason of enemy control, enemy ownership of its stock or enemy affiliation of its management and directors, or by reason of having done business within several enemy and enemy-occupied countries,[9] or by reason of its having engaged in a world-wide conspiracy to cloak the assets of I. G. Farben.

[9] Petitioners are incorrect in their statement (Brief, p. 15) that there is no question "presented by any of the pleadings in this case now before the Court whether I. G. Chemie did busi-

Having sought to frame the case as a question of the relative virtue of enemy and nonenemy stockholders, petitioners would go on (Brief, pp. 36 *et seq.*) to have the Court believe that a vesting of corporate assets, without regard to the "rights" of nonenemy, nontainted stockholders, is a novel and somewhat shocking thing. The fact is that the Act has always contemplated such consequences. Section 2(a) of the Act (Appendix, p. 53, *infra*), since it was first enacted in 1917, has provided for the vesting of all the American property of a foreign corporation which merely does business within enemy territory, whatever its place of incorporation or the composition of its body of stockholders. It could hardly be suggested that where a neutral corporation becomes an enemy by doing branch business both in the United States and in Germany, its nonenemy stockholders have a right to a share of the United States assets vested from the corporation. Cf. *Swiss National Insurance Co.* v. *Miller*, 267 U.S. 42; *Swiss National Insurance Co.* v. *Crowley*, 136 F. 2d 265 (C.A. D.C.), certiorari denied, 320 U.S. 763. Nor could it be suggested that the nonenemy individual stockholders have rights in assets vested

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ness within enemy territory." Paragraph 3 of the first count of Chemie's complaint (R. 2), as denied by defendants' answer (R. 16), squarely puts in issue the question whether plaintiff is a company resident outside the United States and doing business within the territory of any nation with which the United States is at war, within the meaning of Section 2(a) of the Trading with the Enemy Act. (Appendix, p. 53, *infra*.)

from a corporation whose management has in fact gone over to the enemy and is using the assets to wage war against us. Cf. *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480. We submit there is equal ground for vesting and retaining the property of corporations which are enemy tainted for whatever reason, whether it be that they are incorporated in Germany, that they do business there, or that they are controlled by the enemy in fact or by virtue of 50% enemy stock ownership.[10]

In all these cases the owner is a real enemy. His property is capable of being used against us, and the purposes of the Act require its vesting. *Clark* v. *Uebersee Finanz-Korp., supra; Josephberg* v. *Markham*, 152 F. 2d 644, 648 (C.A. 2); *Koehler* v. *Clark*, 170 F. 2d 779 (C.A. 9). Neutral

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[10] It is a valid inference that 50% of stockholders in a corporation exercise control. Cf. Sec. 32(a)(2)(E), Trading with the Enemy Act, Appendix, p. 60, *infra*. Corporations have been constitutionally subjected to consequences because of majority stockholding by aliens. A number of states prohibit, upon pain of escheat, the ownership of land by aliens or by corporations in which aliens own 50% or, in some cases, 20% of the stock. E.g., Constitution of Washington, Art. II, sec. 33 (50%); Cal. Gen. Laws (1945), Art. 261, Secs. 3, 7, 8 (50%); D. C. Code (1945), § 45-1503.4 (50%); Minn. Stat. Ann. (1947), Sec. 500.22 (20%); see 1 Powell, *Real Property* (1949), Sec. 108. Such prohibitions are constitutional. *Frick* v. *Webb*, 263 U.S. 326. But cf. *Sei Fujii* v. *State*, 217 P. 2d 481, rehearing denied, 218 P. 2d 595 (Cal. App.). These provisions prohibit the ownership of land by any corporation the majority of whose stock is held by aliens, though at the time the land was acquired a majority of the stock was held by citizens. *State* v. *Hudson Land Co.*, 19 Wash. 85, 52 Pac. 574.

See also Communications Act of 1934, 48 Stat. 1086, 47 U.S.C. secs. 222(d), 310, denying licenses to corporations having more than 20 percent alien ownership.

or American minority stockholders of course suffer financial harm when the corporate assets are vested as those of an enemy. As investors, they must accept the consequences of losses by the corporation. *Anderson* v. *Abbott,* 321 U.S. 349, 361; *Marr* v. *Tumulty,* 256 N.Y. 15, 24, 175 N.E. 356, 358. If petitioners' position were accepted, whenever a corporation suffers a loss by a fine or a forfeiture, or whenever double liability is imposed on bank shares, stockholders with no influence in the management would be entitled to a refund of proportionate shares of the amount involved.

The Custodian is said by petitioners (Brief, pp. 25-6) to be inexplicably inconsistent in vesting only the enemy stock interest in American corporations while vesting all the assets of neutral companies whose only fault has been that a part of their stock is owned by enemies. There has never been a vesting of assets of a neutral company on this ground alone. In every case there have been other features of enemy taint such as direct enemy control of the management or direct cloaking of the vested property by the neutral for the enemy. Where enemy ownership of stock exists, the Custodian vests if he believes the enemy stock interest to be controlling in fact, or because it is 50% or more of the total. Indeed, the Custodian recently released from freezing and determined not to vest assets of a Swiss corporation 49% of

the stock of which was owned by enemies, because, he concluded, the enemy stockholders did not in fact control the corporation.

No cases pass on the precise question of whether stockholders have an interest in corporate property vested as that of an enemy. The question of interests in such stockholders has, however, arisen in the law of prize and abroad, in circumstances similar to the present case. It has consistently been decided against the stockholders.

In the law of prize, closely related to the Trading with the Enemy Act (*Stoehr* v. *Wallace*, 269 Fed. 827, 840-1 (S.D.N.Y.), aff'd. 255 U.S. 239, 242), it is settled that stockholders, though nonhostile, have no rights in seized property. *The Pedro*, 175 U.S. 354, 367; *Steamship "Marie Glaeser,"* 1 Lloyd's Prize Cases 56 (1914). Since the decision of the House of Lords in *Daimler Co.* v. *Continental Tyre & Rubber Co.* [1916] 2 A.C. 307, the British courts, in determining enemy character, have looked through the corporate form to the underlying realities, as this Court did, albeit in a broader fashion, in *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480. Yet the House of Lords in the *Daimler* case recognized that stockholders have no property in the assets of the corporation. [1916] 2 A.C. at 338, 340; see *The Noordam* (No. 2), [1919] P. 255, 259, affirmed [1920] A.C. 904. And the principle remains firm that nonenemy stockholders of an enemy corporation have no rights when a ship owned by the corporation is seized in prize. In

my opinion, there is no authority for applying the principle of the *Daimler* case in favour of claimants in prize; though it is clearly applicable in favour of the Crown (*The Glenroy* [[1945] A.C. 137]). Moreover, it seems to me that it would be contrary to settled principle to do so." Lord Merriman, in *The Unitas* [1948] P. 205, 219, affirmed [1950] 2 A.C. 536. See also, *The Noordam* (No. 2), *supra*.

A case strikingly similar to the instant one was decided by the Court of Appeal a week after the decision of the House of Lords in *Daimler*. The Court ordered a ship owned by a British company forfeit to the Crown under the Merchant Shipping Act as improperly registered as British, for the reason that the company was dominated by its majority stockholders in Germany. *The Polzeath* [1916] P. 241, affirming [1916] P. 117. Swinfen Eady, L.J., wrote as follows of a petition filed by British minority stockholders ([1916] P. at 256):

> In my opinion the British shareholders are not entitled to intervene. It is suggested that the ship should be appraised, and that payment should be made to the British shareholders in proportion to their holdings. The Court has no such power; it cannot administer the affairs of the company. If any hardship is caused to innocent shareholders by the declaration of forfeiture their position is that they can only appeal to the merciful consideration of the Crown. The order giving them leave to intervene must be discharged.

A leading case in international arbitration has held explicitly against the rights of stockholders in a case analogous to that presented here. Under the Treaty of Versailles a quantity of German shipping was to be transferred to the Reparations Commission. The Commission laid claim to oil tankers owned by a German corporation whose sole stockholder was the Standard Oil Company, an American corporation. The United States took up the claim of Standard Oil and together with the Commission submitted the controversy to an Arbitral Tribunal. The Tribunal held for the Commission on the ground that not even the sole stockholder of the German corporation had any rights in the corporate assets. The American arbiter dissented, but only on the ground that the terms of reference were not intended to limit the question to the legal interest of Standard Oil as a stockholder and permitted a decision for Standard Oil if it had the "economic interest" in the tankers. *Standard Oil Tankers Case, Arbitration Award,* Aug. 5, 1926, 2 Foreign Relations of the United States, 1926, p. 166. Similar decisions have been made by the highest court of France.[11]

Petitioners rely upon two cases, *Standard Oil Co.* v. *Clark,* 163 F. 2d 917 (C.A. 2), certiorari de-

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[11] *Pellerin et Orosdi* contre *Ministère Public et Laforge*, November 14, 1923, Gazette du Palais, 1924, p. 172, Journal du Droit International, 1924, p. 1013; *Wilkens* contre *Lagarde et Procureur de la République près le tribunal de Papeete*, June 21, 1926, Sirey, 1926, I, 268; Annual Digest of International Law Cases, 1925-1926, p. 466. The first cited case involved a claim by French stockholders of a German corporation whose

nied, 333 U.S. 873 (Brief, pp. 21-4) and *Clark* v. *Uebersee Finanz-Kôrp.*, 332 U.S. 480 (Brief, pp. 17-20).

In *Standard Oil* the Court of Appeals (at p. 926) considered whether, if Standard Oil Co. were a foreign national "to the extent" it had been acting for I. G. Farben, pursuant to the definition of "national" in Executive Order No. 8785,[12] it would then be barred by Section 5(b) of the Act from bringing a suit under Section 9(a) for return of other assets owned by it, and not being cloaked. The case presented no issue of separability of interests in assets of a corporation according to the enemy character of its stockholders or the right of a stockholder to recover corporate property.

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assets in France had been seized as enemy property under the French equivalent of the Trading with the Enemy Act. The Court of Cassation rejected the claim on the ground that so long as the corporation existed, its stockholders had no fixed or enforceable right in its property. In the second cited case that court on the same ground denied a claim of an American stockholder to a proportionate share of the assets of a German corporation seized as enemy property.

The Austro-Yugoslav Mixed Arbitral Tribunal has ruled similarly, in a case in which the claimants were two Austrian banks which owned two-thirds of the stock of a German corporation, the property of which was expropriated by the Yugoslav government. *Oesterreichische Credit-Anstalt et al., claimants* v. *Yugoslav Government*, September 8, 1927, Austro-Yugoslav Mixed Arbitral Tribunal, Recueil des Décisions des Tribunaux Arbitraux Mixtes, VII, p. 794.

[12] "The term 'national' shall include,

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"(iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country (Executive Order No. 8785, June 14, 1941, 6 F.R. 2897).

Petitioners place a good deal of reliance (Brief, pp. 17-20) upon the Court's opinion in *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, and particularly upon the concluding paragraph of the opinion. In that paragraph (332 U.S. at 489), set out in the footnote,[13] Mr. Justice Douglas stated some of the questions, not being decided, which were raised by the expansion of the definition of enemy accomplished by that decision. Petitioners refer particularly (Brief, p. 19) to the question as to "what part of a friendly alien corporation's property may be retained where only a fractional enemy ownership appears." All the questions raised were left to "legislative or judicial clarification" and at the word "legislative" there is appended in the footnote a reference to Section 32(a)(2)(E) of the Act, which permits a return to a corporation

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[13] It is suggested, however, that this approach [the expansion of the definition of "enemy"] may produce results which are both absurd and uncertain. It is said that the entire property of a corporation would be jeopardized merely because a negligible stock interest, perhaps a single share, was directly or indirectly owned or controlled by an enemy or ally of an enemy. It is also pointed out that securities or interests other than stock might be held by an enemy or ally of an enemy and used effectively in economic warfare against this country. But what these interests are, the extent of holdings necessary to constitute an enemy taint, what part of a friendly alien corporation's property may be retained where only a fractional enemy ownership appears, are left undecided. Since we assume from the allegations of the complaint that respondent is free of enemy taint and therefore is not within the definition of enemy or ally of an enemy, those problems are not now before us. We recognize their importance; but they must await legislative [9] or judicial clarification.

[9] See 60 Stat. 50, adding §32(a)(2)(E) to the Act.

when 50 percent or more of the stock is owned by nonenemies and the corporation is not enemy controlled. It may well be that the 50-percent rule of Section 32(a)(2)(E), which is followed by the Custodian in his vesting actions, will be regarded as a legislative view of another of the questions stated in *Uebersee*—"the extent of holdings necessary to constitute enemy taint." The scheme and details of Section 32 provide legislative clarification of the proposition, relevant here, that nonenemy stockholders can have no rights in vested corporate assets.

As a first principle, Section 32(a)(1) provides that no return shall be made except to "the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian," or to the legal representatives or successors in interest of such owners (Appendix, p. 57, *infra*). The substantially identical language in Section 9(b),[14] applicable to returns of property seized in World War I, was held limited to "those whose interest in the seized thing amounted to ownership, as that term has been understood and defined." *Richmers Rhederei Actien Gesellschaft* v. *Sutherland*, 23 F. 2d 989, 991 (C.A.D.C.), certiorari denied, 276 U.S. 632. A stockholder of course does not have such an interest in the seized corporate property.

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[14] "the owner . . . [of the money or other property] at the time such money or other property was required to be so conveyed . . . to the Alien Property Custodian." Sec. 9(b), 41 Stat. 977, 50 U.S.C. App. Sec. 9(b).

Section 32 goes on, in subdivision (a)(2)(B), to provide for a return to stockholders in an enemy corporation, but only in the case where the stockholders are American and own 100 percent of the shares of the enemy corporation. The limitation of returns to stockholders to such a case was deliberate. See S. Rep. 920, 79th Cong., 2d Sess., p. 4; H. Rep. 1269, 79th Cong., 1st Sess., p. 4. In singling out this situation for a grant of rights to stockholders, the Congress clearly implied that stockholders holding less than 100 percent are to be left without rights. Congress did not overlook the economic loss to friendly minority stockholders. To date it has chosen to mitigate that loss only by providing in Section 32(a)(2)(E) for a return to a neutral corporation when less than 50 percent of the stock is held by enemies. And that return is to be made to the corporation.

Confirmation of Congress' view that minority stockholders have no rights appears from congressional action since the enactment of Section 32. The 81st Congress enacted a private bill, H. R. 8422, directing the return of 30 percent of the assets of two Honduran corporations to one Countess von Plettenberg who owned 30 percent of the stock of the corporations and who was personally eligible for a return of her own property under Section 32(a)(2)(D), Appendix, p. 59, *infra*. See H. Rep. 2157, S. Rep. 1526, 81st Cong., 2d Sess. The President vetoed the bill on June 23, 1950,

returning it with a statement that although he was in sympathy with its objective, the problem presented by the case should be solved by general legislation giving relief to others in the same plight. H. Doc. 628, 81st Cong., 2d Sess. Petitioners argue (Brief, p. 30) that by this veto the President "formally approved" the "right" of return to stockholders. If anything, both the President's veto message and the bill itself are a "formal" approval that no right of return exists in the absence of new legislation, whether a private bill or general amendment.[15]

Since the veto of H. R. 8422 various bills to give general relief to friendly minority stockholders were introduced and considered in the 81st and 82d Congresses. One of these, S. 3901,

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[15] Like comment could be made of the international agreements which, petitioners urge (Brief, pp. 26-29, 34-5), show the policy of the Department of State to protect American stockholder interests in vested assets. These agreements recognize that the "policy" they express is understood to be a grant of rights not otherwise effective. Maurer, *Protection of Non-Enemy Interests in Enemy External Assets*, 16 Law & Contem. Prob., 407, 422 (1951). Both agreements cited are inapplicable to this case. The Brussels Agreement of 1947, to which Switzerland is not a party, provides explicitly that it shall confer no justiciable rights and, incidentally, exempts the assets involved in the case now before this Court from even its internationally operative effect. Agreement Relating to the Resolution of Conflicting Claims to German Enemy Assets, Brussels, December 5, 1947, H. Rep. 2770, 81st Cong., 2d Sess., p. 17, at p. 26 (Annex, Art. 33), p. 18 (U. S. reservation). The other agreement cited by the petitioners, the Washington Accord of 1946, relates only to assets in Switzerland. Art. I, Sec. 1, 14 State Dept. Bul. 1121 (1946). An agreement between Switzerland and this Government on intercustodial conflicts which would affect assets in the United States has been under discussion for some time.

was reported favorably by the Senate Committee on the Judiciary and was passed by the Senate on July 26, 1950. S. Rep. 2051, 81st Cong., 2d Sess.; 96 Cong. Rec. 11067-8. A companion bill, H. R. 8998, was with S. 3901 the subject of hearings before a House subcommittee, which were not completed when the 81st Congress adjourned. Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess., on various bills including H. R. 8998 and S. 3901, 81st Cong., 2d Sess., pp. 365-411. In the 82nd Congress, four bills for the relief of minority stockholders had been introduced and incomplete hearings on two of them were held in October, 1951. H. R. 133, H. R. 2263, H. R. 4284, S. 2339, 82d Cong., 1st Sess.; MSSHearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce on various bills including H. R. 2263 and H. R. 4284, October 18-20, 1951, 82d Cong., 1st Sess.

As these bills illustrate, any grant of relief to minority stockholders presents problems most difficult of satisfactory solution by the courts. At the outset, there is the practical problem of providing the minority stockholders who are to have rights with sufficient time in which to make their claims. The bills under consideration in the present Congress provide for six months or two years from the date of enactment or from the vesting, whichever is later. H. R. 133, H. R. 2263, S. 2339 (2 years); H. R. 4284 (six months). The courts could only

find that such rights exist as of a given time in the past, with the consequence that the already existing period of limitations would bar most plaintiffs. (See pp. 12-14, *supra*.)

Various of the bills suggest desirable safeguards which should accompany the grant of such a novel right of recovery. One of the pending bills (H.R. 4284) requires that the stockholder-claimant have owned his shares continuously since September 1, 1939, thus preventing windfalls to those who purchased from the enemy in anticipation of war. Another (H.R. 133) would limit the stockholder's recovery to the cost to him of his ownership interest. The most recently introduced of these bills (S. 2339) provides that the claimant may be paid only upon a finding that allowance of his claim is consistent with the public interest.[16]

All of the presently pending bills would treat the minority stockholder as secondary to those creditors whose claims are payable under Section 34 of the Act (Appendix, p. 62, *infra*). Were the courts to recognize an ownership interest of minority stockholders in vested corporate assets, the stockholders would have a priority over creditors unheard of in the law, and contrary to the policy of Section 34 of the Act (Appendix, p. 62, *infra*) and of the provision in favor of creditors in Section 32(a)(2)(B), the sole instance in which Congress

[16] Other limitations include requirements that the stockholder be an American and that he must have owned his stock continuously to the date of allowance of his claim.

has directed a return of corporate assets to a stockholder. Still another question is whether minority stockholders should have rights where the corporation is insolvent, taking into account all its creditors, whether eligible for payment under Section 34 or not. One of the pending bills distinguishes between the payments to be made to stockholders in the insolvent corporation and in the solvent corporation. H. R. 4284. Aside from all these difficulties in the administration of an equitable system for relief of minority stockholders, there is the basic question, before the Congress for decision, whether stockholders should have preference over the prisoners of war and the other war-damage claimants who are given first priority on the proceeds of vested enemy property under the War Claims Act of 1948 (50 U.S.C. App. (Supp. III) Secs. 2001-2013, 60 Stat. 1240, as amended).

III

Petitioners Have No Right to Intervene to Present a Cause of Action for a Portion of the Assets

We have shown above that there is here no corporate right or duty and, in addition, that there is no interest upon which suit can be founded. It follows that under Rule 24 of the Federal Rules of Civil Procedure, petitioners have no grounds for intervention.[17]

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[17] Special considerations bearing on petitioners' right to intervene to enjoin a settlement of the action are discussed in Point IV, p. 46, *infra*.

Petitioners have not appealed to the discretionary power of the trial court to order intervention under subdivision (b) of Rule 24 (Appendix, p. 52, *infra*). They neither alleged nor sought to prove, as required by Rule 24(b), that their "claim or defense and the main action have a question of law or fact in common." The district judge, moreover, strongly indicated his views on a possible exercise of his discretionary power when he ruled that he would not construe the Rule as permitting the suit to become "virtually a free-for-all" (R. 76).[18] Petitioners' attempt to intervene must therefore be judged by the standards of Rule 24(a), more particularly by clauses 2 and 3, the only clauses which petitioners have invoked.

Clause 2.—This clause permits intervention when the "representation of applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." Petitioners will not be bound by the judgment in the corporation's action against the Custodian, unless they are allowed to become parties. As the Court of Appeals held, "If they have a right to a share of the vested assets, they cannot be deprived of it in a suit to which they are not parties" (R. 80). In *Sutphen Estates, Inc.* v.

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[18] This Court has sharply limited appellate review of a discretionary ruling against intervention. *United States* v. *California Canneries*, 279 U. S. 553, 556; *Railroad Trainmen* v. *B. & O. R. Co.*, 331 U.S. 519, 524; *Pipe Line Co.* v. *United States*, 312 U.S. 502, 506.

United States, No. 25, October Term 1951, the Court rejected a claim of intervention under clause 2, saying (p. 2, slip opinion):

> Appellant, however, is not a privy of Warner; its rights not only do not derive from Warner, they are indeed adverse to Warner. The decree in this case, like that in *Credits Commutation Co.* v. *United States*, 177 U.S. 311, therefore is not *res judicata* of the rights sought to be protected through intervention.

These petitioners, too, are not privy to the corporation; their asserted rights do not derive from the corporation but are rather adverse to those of the corporation.

Petitioners are not privy to the corporation because they are asserting an individual grievance for which they desire compensation. A judgment in a suit by a corporation does not preclude stockholders from thereafter asserting their personal rights. *Rambo* v. *United States*, 117 F. 2d 792 (C.A. 5); *Palmer* v. *Guaranty Trust Co.*, 111 F. 2d 115 (C.A. 2). Thus, a stockholder may not intervene in his corporation's suit in order to assert an individual grievance or to complain in his own right of a wrong to the corporation.

The initial denial and later grant of intervention to a stockholder, recorded in *Pipe Line Co.* v. *United States*, 312 U.S. 502, illustrates the principle. When the stockholder sought to intervene on the strength of his status as stockholder alone—

in his own right—intervention was denied. When he amended his petition to seek intervention in the corporation's right, intervention was granted. *Pipe Line Co.* v. *United States,* 312 U.S. at 508. See *United States* v. *Columbia Gas & Electric Corp.,* 27 F. Supp. 116, 120 (D. Del.), appeal dismissed *sub nom. Missouri-Kansas Pipe Line Co.* v. *United States,* 108 F. 2d 614 (C.A. 3), certiorari denied, 309 U.S. 687. So here, it is appropriate to reject petitioners' effort to intervene in the corporation's right in order to vindicate rights personal to the stockholders.

By petitioners' own allegations, the issues which they seek to raise will not be raised by the corporation in its suit (R. 50-1, 52-3). Indeed, since petitioners' rights are essentially contradictory of the corporation's right (pp. 17-19, *supra*), the corporation could not raise them if it would. In these circumstances, the final judgment in the corporation's case, in the words of this Court in the *Sutphen Estates* case, *supra,* will not be "*res judicata* of the rights sought to be protected through intervention."

Whether an applicant for intervention will be bound by the judgment is ordinarily decided hypothetically, with a view to an independent suit which the applicant may file in the future. Here, however, applicants have already brought an independent suit and its incidents afford proof that they and their independent suit will not be prejudiced by

the judgment in the instant case. Shortly before filing their motion to intervene here, petitioners filed a suit against the Custodian in the District Court for the Southern District of New York. The suit is frankly brought in petitioners' own right as stockholders for their alleged share of the assets. (R. 83-6). Petitioners ask judgment on the basis of their claim that as nonenemy shareholders they "are entitled to their full proportionate share of the property vested in the defendant . . . notwithstanding that Interhandel, A.G. [the corporation], by reason of alleged enemy interest or otherwise, may [in its suit in the District of Columbia] fail to obtain the return of said vested property or may affect a settlement with defendant for some amount less than the fair and true value of the aforesaid vested property (R. 85)." The District Court for the Southern District of New York has held, on a motion to dismiss, that this complaint states a good cause of action. *Kaufman* v. *McGrath*, S.D.N.Y., Civ. No. 56-246, October 5, 1950, without opinion. We think that court was wrong in holding that nonenemy stockholders have such rights, but it remains, as the Court of Appeals below recognized (R. 80), that in prosecuting their New York suit, petitioners will neither be bound nor prejudiced by the judgment here. The only effect of the judgment here can be that any recovery by the corporation in this, its suit, will reduce the alleged damage to petitioners.

Clause 3.—This clause of Rule 24(a) permits intervention when the applicant is "so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

1. Petitioners do not have the required interest in the property in issue. The interest required for intervention as of right, prior to the adoption of the Rule, was that of a recognized interest in a *res*. *United States* v. *California Canneries*, 279 U. S. 553, 556; *Radford Iron Co.* v. *Appalachian Electric Power Co.*, 62 F. 2d 940, 942 (C.A. 4), certiorari denied, 289 U.S. 748; *Vertner* v. *Vertner*, 70 F. 2d 783 (C.A.D.C.); *Board of Commissioners* v. *Bernardin*, 74 F. 2d 809, 815-16 (C.A. 10), certiorari denied, 295 U.S. 731. The Rule generally, and clause 3 specifically, was intended as a codification of the prior principles. *Pipe Line Co.* v. *United States*, 312 U.S. 502, 508; *United States* v. *Columbia Gas & Electric Corp.*, 27 F. Supp. 116, 120 (D. Del.), appeal dismissed *sub. nom. Missouri-Kansas Pipe Line Co.* v. *United States*, 108 F. 2d 614 (C.A. 3), certiorari denied, 309 U.S. 687. The right to intervene granted by clause 3 must therefore be grounded on a legal or equitable title to a *res*. *Pure Oil Co.* v. *Ross*, 170 F. 2d 651 (C.A. 7); *Gross* v. *Missouri & A. Ry. Co.*, 74 F. Supp. 242, 249 (W. D. Ark.); 4 Moore, *Federal Practice* (2d ed.), Par. 24.09[2].

Professor Moore writes (*ibid.*):

> What kind of an interest must a petitioner have in property subject to the control of a court before he can claim an absolute right to intervene? Obviously it must be an interest known and protected by the law; a claim of ownership, or a lesser interest, sufficient and of the type to be denominated a lien, equitable or legal.

Since petitioners do not have such an interest (Point II, p. 20, *supra*), the requirement of Clause 3 is not met. And even if petitioners did have an interest, the corporation could not be plaintiff for petitioners' interest (Point I, p. 10, *supra*) and thus if the corporation be regarded as the party in whose right intervention is sought, it would lack the interest required under clause 3.

2. Even if petitioners should be held to have an interest capable of recognition, they do not meet the further requirment of clause (3), that applicants for intervention be "adversely affected" by the disposition of the property in the pending action.[19] Three times they have alleged adverse

[19] An applicant may, of course, have a traditional interest in the property in suit and yet not be subject to adverse effect by the disposition which may be made in the suit in which he seeks to intervene. For instance, in *Palmer* v. *Guaranty Trust Co.*, 111 F. 2d 115 (C.A. 2), there was an attempt to intervene in a mortgage foreclosure action by persons who alleged that they had a lien upon the mortgaged assets prior to the lien of the mortgage. The Court of Appeals for the Second Circuit held that even if the claim were valid, a sale under the mortgage would not adversely affect it, because the judgment would preserve all prior liens upon the mortgaged property.

effect as a conclusion of law (R. 53, 62, 66), but they have not attempted to make a showing of adverse effect, as is required under Rule 24(a)(3). *Sutphen Estates, Inc.* v. *United States*, No. 25, October Term 1951, p. 3, slip opinion. They are required to prove "adverse effect" on their own theory of intervention, *i.e.*, that the corporation, and not the stockholder is the proper claimant. However, in their brief (p. 49) petitioners baldly state without amplification that "adverse effect" will follow from a holding that the nonenemy stockholders are the proper claimants for their own interests in their own suit. The statement startles, for, as we have pointed out, the petitioners must show the "adverse effect" necessary for intervention on the assumption that the corporation is the correct claimant. It is, moreover, a *non sequitur* that adverse effect follows from a holding that nonenemies must bring suit on their own behalf. If they must sue for themselves, the outcome of the corporation's suit cannot possibly affect them adversely. The corporation is a stranger to them, in this respect, and petitioners' right to a separate suit continues.

Petitioners offer no reason why a separate suit against the Custodian does not give them an entirely adequate remedy. They have apparently abandoned arguments they have made before.

In the court below, petitioners argued that the adverse effect lay in the possibility that on a settle-

ment or on a defeat of the corporation the Custodian would be free to sell the property and petitioners could not, by an independent suit, immobilize the vested property in the Custodian's hands. They abandoned this argument after we pointed out that by the terms of the statute the filing of every suit under Section 9(a) (Appendix, p. 56, *infra*), including petitioners' suit in New York, operates as a stay of sale of the property sued for until final judgment. *Sielcken-Schwarz* v. *American Factors*, 60 F. 2d 43 (C.A. 2), certiorari denied 287 U. S. 654; *Sigg-Fehr* v. *White*, 285 Fed. 949 (C.A.D.C.); *Standard Oil Co.* v. *Markham*, 57 F. Supp. 332 (S.D.N.Y.); *Draeger Shipping Co.* v. *Crowley*, 49 F. Supp. 215 (S.D.N.Y.). Any person wishing to claim rights under Section 9(a) may sue immediately on the vesting, and thus has "immediate power . . . to impound . . . [the property sued for] 'in the custody' of the Custodian till final decree." *Sielcken-Schwarz* v. *American Factors, supra*, 60 F. 2d at 45.

At one point in the complaint (R. 59) and in their petition for certiorari (p. 13), they speak of the adverse effect on a separate suit of the corporation's removal of the assets from the jurisdiction, after the corporation's suit is over. No removal of assets by the corporation can prejudice petitioners. A removal of all the assets, such as would take place on a final judgment for the plaintiff corporation, would merely undo the vesting and

petitioners would then have no damage, loss, or complaint. A removal of part of the assets, on partial judgment or on an agreed division of the assets in settlement, would *pro tanto* benefit the petitioners, as stockholders in the corporation. Petitioners lose sight of the fact that as stockholders they have no grievance if their corporation regains the property and thereby restores the situation which existed prior to vesting. Petitioners can have rights only to the extent that the vesting is upheld and the corporation fails to recover and thus *cannot* remove the assets.[20] As shown above, any part of the assets remaining with the Custodian after the corporation's suit is disposed of by settlement or judgment, will by Section 9(a) of the Act be frozen in the Custodian's hands to the extent necessary to pay any judgments sought in pending separate suits. Petitioners have an ample remedy by way of a separate suit and are incapable of being adversely affected by the outcome of this suit.

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[20] All but explicitly, petitioners admit that they have rights only in this eventuality. In their complaint in New York, they allege (R. 85):

"Plaintiffs, as shareholders of I. G. Chemie, later known as Interhandel, A.G., are entitled to their full proportionate share of the property vested in the defendant as aforesaid, or to the proceeds of any sale thereof for fair and full value by defendant, *notwithstanding that Interhandel, A.G., by reason of alleged enemy interest or otherwise, may fail to obtain the return of said vested property or may effect a settlement with defendant for some amount less than the fair and true value of the aforesaid vested property.*" [Emphasis added].

IV

Petitioners Have No Cause of Action, and No Right to Intervene, to Enjoin a Settlement of the Action by the Respondents

In their second and third counts and their second and third prayers (R. 57-67), petitioners allege a cause of action for an injunction of a settlement of the action by the respondents.

A settlement is said to be improper and enjoinable on two grounds. First, that it would not impose upon the plaintiff corporation a duty of using the proceeds to pay in full the claims of the nonenemy stockholders (R. 58, Brief, pp. 46-7, 49-50). Second, that it would be illegal under the Trading with the Enemy Act because the proceeds, when paid to the corporation, would be of indirect benefit to the admitted enemies who own 10.9% of the plaintiff corporation's capital stock (R. 58-9, Brief, pp. 46-7, 49-50).

Petitioners' first challenge to the settlement—that it will damage their interest—assumes that they have an interest and that it is in issue on the corporation's suit. We have shown, however, that the corporation owes them no duty to seek to recover on their behalf (Point I, p. 10, *supra*) and that in any event they have no interest to be recovered (Point II, p. 20, *supra*). They may not have intervention to protect rights which are nonexistent. And if they have an interest, they may bring a separate suit to protect it, and need

no injunction in this suit. Petitioners' right to prosecute an independent suit against the Custodian to recover what they believe to be their share of the assets will not be diminished or harmed, whatever the outcome of the corporation's suit (pp. 39-40, 43-45, *supra*), and particularly not by a settlement. A settlement would be *res judicata* of nothing except that the corporation may not have a return to it. Petitioners' rights to a portion of the assets would continue, unchanged by a settlement, except that any sums or assets paid to the corporation in settlement of its claims will lessen, *pro tanto*, the asserted damage to petitioners. In the language of Rule 24(a), they will not be bound by the judgment entered on a settlement here and they will not be adversely affected.

Once petitioners' first ground for attacking a settlement—damage to their property interest—is rejected, their second ground—illegality of a settlement—must fall for lack of standing to raise the point. Petitioners admit that absent a showing of damage, they lack standing. They state that "the nonenemy shareholders might not have the standing to object, if it [the settlement] were not to be at their expense" (Brief, p. 47). As citizens or taxpayers, and aside from any claim of prejudice to their claims, petitioners have no status to sue to enjoin a settlement of a pending action by the Attorney General and the plaintiff corporation. Petitioners, "to have standing in

court, must show an injury or threat to a particular right of their own as distinguished from the public's interest in the administration of the law." They cannot "vindicate any general interest which the public may have in the construction of the Act . . ." *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125.

Despite this lack of standing, we do not wish to leave their charge of illegality unanswered. The charge is that a settlement would be illegal because it would be a "return" which, by increasing the corporate resources, would inure to the benefit of the enemy stockholders in the plaintiff. Such a result, petitioners urge, would defeat the purposes of the Trading with the Enemy Act (R. 58-9, Brief, p. 47). The short answer is that a settlement is a far cry from a return. A decision to settle is based on a multitude of factors such as the amount of the offer to settle, the likelihood of victory on trial, the necessary unpredictability of all litigation, and, most important in such cases, the time required for litigation and the desirability of ending Government ownership of the business concern involved in a much shorter period than litigation would require.

Even if such a settlement could be regarded as a return, it would not violate Congressional policy. By Section 32(a) (2) (E) (Appendix, p. 60, *infra*), the Custodian has discretion to make a return to a nonhostile corporation, although as much as 49% of its stock is owned by enemies.

The indirect benefit to the enemy stockholders did not impress the Congress, so long as it was determined by the Custodian that the return would not violate the national interest. A settlement resulting in the same indirect benefit to some enemies is thus not at all beyond the Act's contemplation.

Still other considerations confirm the invalidity of petitioners' counts for an injunction against a settlement. Suits against the Custodian are suits against the United States. *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 118; *Becker Co.* v. *Cummings*, 296 U.S. 74, 78. They must therefore be grounded on a consent by Congress to be sued; "this suit is in effect a suit against the United States and all of its conditions must obtain." *Banco Mexicano* v. *Deutsche Bank*, 263 U.S. 591, 603. Nowhere has the United States consented that it, by its Alien Property Custodian, may be sued for an injunction against a proposed settlement of a pending suit.

Any such injunction, moreover, would interfere with the Attorney General in the conduct of the duties of his office. As law officer of the Government and head of the Department of Justice, the Attorney General has full powers to conduct and settle suits by and against the United States. 5 U.S.C. Secs. 291, 309, 310, 316; Executive Order No. 6166, June 10, 1933, Sec. 5, set out at 5 U.S.C. (1946 ed.) Secs. 124-132, p. 101; *Swift & Co.* v. *United States*, 276 U.S. 311, 331; *United States* v. *California*, 332 U.S. 19, 27; *Duncan* v. *United States*,

39 F. Supp. 962, 964 (W.D. Ky.); see 38 Op. Atty. Gen. 98, 100; 38 Op. Atty. Gen. 124, 126.[21] The Attorney General may dismiss suits though harm is thereby caused to others (*Confiscation Cases*, 7 Wall. 454; *Conner* v. *Cornell*, 32 F. 2d 581, 585 (C.A. 8) certiorari denied, 280 U.S. 583). *A fortiori*, he may, with the same result, settle suits.

Petitioners would not only interfere with the right of the Attorney General to settle, out of court, suits brought against him as Custodian. They flout as well the traditional public policy which, favoring amicable settlements, frowns on attempts to impede them. *Kendall* v. *United States*, 7 Wall. 113, 116.

CONCLUSION

Petitioners, stockholders, seek to intervene in order to require plaintiff corporation to assert a cause of action under the Trading with the Enemy Act for return to its nonenemy stockholders of a proportionate share of assets vested from the corporation. No such cause of action can exist. Moreover, under the Act stockholders have no interest in vested corporate assets. In any event, the outcome of this case will in no circumstances bind or prejudice nonenemy stockholders in asserting, in suits against the Custodian, any separate inter-

[21] Even before the Attorney General became the Alien Property Custodian, he had by Executive Order the duty of supervising the Alien Property Custodian's litigation. Executive Order No. 9142, April 21, 1942, Sec. 5, 7 F.R. 2985; Executive Order No. 9788, October 14, 1946, Sec. 1, 11 F.R. 11981.

est they may have in the vested assets. For these reasons and others, they may not require the corporation to assert the desired cause of action, and they have no right to an injunction against a settlement of this action. Accordingly, they have no right to intervene under Federal Rule 24(a) and the judgment should be affirmed.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

HAROLD I. BAYNTON,
Assistant Attorney General.

JAMES D. HILL,
GEORGE B. SEARLS,
DAVID SCHWARTZ,
SIDNEY B. JACOBY,
Attorneys.

DECEMBER, 1951.

APPENDIX

Rule 24 of the Federal Rules of Civil Procedure (28 U.S.C. foll. Sec. 723(c)) provides:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will

unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403.

Pertinent provisions of the Trading With the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App. 1, *et seq.*, provide as follows:

SEC. 2. . . .

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

* * * * * *

SEC. 7. . . . .

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

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SEC. 9. (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid

to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so estab-

lished the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States of the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

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SEC. 16. Offenses; punishment; forfeitures of property. Whoever shall willfully violate any of the provisions of this Act or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than ten years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by a like fine, imprisonment, or both, and any property, funds,

securities, papers, or other articles or documents, or any vessel, together with her tackle, apparel, furniture, and equipment, concerned in such violation shall be forfeited to the United States.

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SEC. 32. (a) The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successors in interest by inheritance, devise, bequest, or operation of law, of such owner; and

(2) that such owner, and legal representative or successor in interest, if any, or not—

(A) the Government of Germany, Japan, Bulgaria, Hungary, or Rumania; or

(B) a corporation or association organized under the laws of such nation: *Provided,* That any property or interest or proceeds which, but for the provisions of this subdivision (B), might be returned under this section to any such corporation or association, may be re-

turned to the owner or owners of all the stock of such corporation or of all the proprietary and beneficial interest in such association, if their ownership of such stock or proprietary and beneficial interest existed immediately prior to vesting in or transfer to the Alien Property Custodian and continuously thereafter to the date of such return (without regard to purported divestments or limitations of such ownership by any government referred to in subdivision (A) hereof) and if such ownership was by one or more citizens of the United States or by one or more corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia: *Provided further*, That such owner or owners shall succeed to those obligations limited in aggregate amount to the value of such property or interest or proceeds, which are lawfully assertible against the corporation or association by persons not ineligible to receive a return under this section; or

(C) an individual voluntarily resident at any time since December 7, 1941, within the territory of such nation, other than a citizen of the United States or a diplomatic or consular officer of Italy or of any nation with which the United States has not at any time since December 7, 1941, been at war: *Provided*, That an individual who, while in the territory of a nation with which the United States has at any time since December 7, 1941, been at war, was deprived of life or substantially deprived of liberty pursuant to any law, decree, or regula-

tion of such nation discriminating against political, racial, or religious groups, shall not be deemed to have voluntarily resided in such territory; or

(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section [March 8, 1946], was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory: *Provided,* That notwithstanding the provisions of this subdivision (D) return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation: *And provided further,* That, notwithstanding the provisions of subdivision (C) and of this subdivision, return may be made to an individual who at all times since December 7, 1941, was a citizen of the United States, or to an individual who, having lost United States citizenship solely by reason of marriage to a citizen or subject of a foreign country, reacquired such citizenship prior to September 29, 1950, if such individual would have been a citizen of the United States at all times since

December 7, 1941, but for such marriage: *And provided further,* That the aggregate value of returns made pursuant to the foregoing proviso shall not exceed $5,000,000; and in making returns under such proviso the Alien Property Custodian shall to the extent practicable make such returns in the order in which notices of claims therefor were received and may return any property or interest if the value thereof, taken together with the aggregate value of property and interests already returned pursuant to such proviso, does not exceed $5,000,000; or

(E) a foreign corporation or association which at any time after December 7, 1941, was controlled or 50 per centum or more of the stock of which was owned by any person or persons ineligible to receive a return under subdivisions (A), (B), (C), or (D) hereof: *Provided,* That notwithstanding the provisions of this subdivision (E), return may be made to a corporation or association so controlled or owned, if such corporation or association was organized under the laws of a nation any of whose territory was occupied by the military or naval forces of any nation with which the United States has at any time since December 7, 1941, been at war, and if such control or ownership arose after March 1, 1938, as an incident to such occupation and was terminated prior to the enactment of this section; and

(3) that the property or interest claimed, or the net proceeds of which are claimed, was not at any time after September 1, 1939, held

or used, by or with the assent of the person who was the owner thereof immediately prior to vesting in or transfer to the Alien Property Custodian, pursuant to any arrangement to conceal any property or interest within the United States of any person ineligible to receive a return under subsection (a) (2) hereof;

(4) that the Alien Property Custodian has no actual or potential liability under the Renegotiation Act or the Act of October 31, 1942 (56 Stat. 1013; 35 U. S. C. 89-96), in respect of the property or interest or proceeds to be returned and that the claimant and his predecessor in interest, if any, have no actual or potential liability of any kind under the Renegotiation Act or the said Act of October 31, 1942, or in the alternative that the claimant has provided security or undertakings adequate to assure satisfaction of all such liabilities or that property or interest or proceeds to be retained by the Alien Property Custodian are adequate therefor; and

(5) that such return is in the interest of the United States.

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SEC. 33. No return may be made pursuant to section 9 or 32 unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, by April 30, 1949, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later.

No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32 (a) hereof.

SEC. 34.

(a) Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer, or if it arose from any action or transactions prohibited by or pursuant to this Act and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the Custodian) if it was at the time of such vesting or transfer due and owing to any person who has since the beginning of the war been convicted of violation of this Act, as amended, sections 1-6 of the Criminal Code, title I of the Act of June 15, 1917 (ch. 30, 40

Stat. 217), as amended; the Act of April 20, 1918 (ch. 59, 40 Stat. 534), as amended; the Act of June 8, 1934 (ch. 327, 52 Stat. 631), as amended; the Act of January 12, 1938 (ch. 2, 52 Stat. 3); title I, Alien Registration Act, 1940 (ch. 439, 54 Stat. 670); the Act of October 17, 1940 (ch. 897, 54 Stat. 1201); or the Act of June 25, 1942 (ch. 447, 56 Stat. 390). Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations. Debt claims allowable hereunder shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States, and who have not during the war been interned or paroled pursuant to the Alien Enemy Act; and those acquired by the Custodian. Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been.

(b) The Custodian shall fix a date or dates after which the filing of debt claims in respect of any or all debtors shall be barred, and may extend the time so fixed, and shall give at least sixty days' notice thereof by publication in the Federal Register. In no event shall the time extend beyond the expiration of two years from the date of the last vesting in or transfer to the Custodian of any property or interest of a debtor in respect of whose debts the date is fixed, or from the date of enactment of this section, whichever is later. No debt shall be paid prior to the expiration of one hundred and twenty days after publication of the first such notice in respect of the debtor, nor in any event shall any payment of a debt claim be made out of any property or interest or proceeds in respect of which a suit or proceeding pursuant to this Act for return is pending and was instituted prior to the expiration of such one hundred and twenty days.

(c) The Custodian shall examine the claims, and such evidence in respect thereof as may be presented to him or as he may introduce into the record, and shall make a determination, with respect to each claim, of allowance or disallowance, in whole or in part.

(d) Payment of debt claims shall be made only out of such money included in, or received as net proceeds from the sale, use, or other disposition of, any property or interest owned by the debtor immediately prior to its vesting in or transfer to the Alien Property Custodian, as shall remain after deduction of (1) the amount of the expenses of the Office of Alien

Property Custodian (including both expenses in connection with such property or interest or proceeds thereof, and such portion as the Custodian shall fix of the other expenses of the Office of Alien Property Custodian), and of taxes, as defined in section 36 hereof, paid by the Custodian in respect of such property or interest or proceeds, and (2) such amount, if any, as the Custodian may establish as a cash reserve for the future payment of such expenses and taxes. If the money available hereunder for the payment of debt claims against the debtor is insufficient for the satisfaction of all claims allowed by the Custodian, ratable payments shall be made in accordance with subsection (g) hereof to the extent permitted by the money available and additional payments shall be made whenever the Custodian shall determine that substantial further money has become available, through liquidation of any such property or interest or otherwise. The Custodian shall not be required through any judgment of any court, levy of execution, or otherwise to sell or liquidate any property or interest vested in or transferred to him, for the purpose of paying or satisfying any debt claim.

(e) If the aggregate of debt claims filed as prescribed does not exceed the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall pay each claim to the extent allowed, and shall serve by registered mail, on each claimant whose claim is disallowed in whole or in part, a notice of such disallowance. Within sixty

days after the date of mailing of the Custodian's determination, any debt claimant whose claim has been disallowed in whole or in part may file in the District Court of the United States for the District of Columbia a complaint for review of such disallowance naming the Custodian as defendant. Such complaint shall be served on the Custodian. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to the claim in question. Upon good cause shown such time may be extended by the court. Such record shall include the claim as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, and the determination of the Custodian with respect thereto, including any findings made by him. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. The court shall enter judgment affirming, modifying, or reversing the Custodian's determination, and directing payment in the amount, if any, which it finds due.

(f) If the aggregate of debt claims filed as prescribed exceeds the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and

the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint shall be served upon the Custodian and on each claimant named in the schedule. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to such schedule. Upon good cause shown such time may be extended by the court. Such record shall include the claims in question as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him; any findings or other determinations made by the Custodian with respect thereto, and the schedule prepared by the Custodian. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian or could not reasonably have been adduced before him or was not available to him. Any interested debt claimant who has filed a claim with the Custodian pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter

judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review.

(g) Debt claims shall be paid in the following order of priority: (1) Wage and salary claims, not to exceed $600; (2) claims entitled to priority under sections 191 and 193 of Title 31, except as provided in subsection (h) hereof; (3) all other claims for services rendered, for expenses incurred in connection with such services, for rent, for goods and materials delivered to the debtor, and for payments made to the debtor for goods or services not received by the claimant; (4) all other debt claims. No payment shall be made to claimants within a subordinate class unless the money from which, in accordance with subsection (d) hereof, payment may be made permits payment in full of all allowed claims in every prior class.

(h) No debt of any kind shall be entitled to priority under any law of the United States or any State, Territory, or possession thereof, or the District of Columbia, solely by reason of becoming a debt due or owing to the United

States as a result of its acquisition by the Alien Property Custodian.

(i) The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section: *Provided,* that no person asserting any interest, right, or title in any property or interest or proceeds acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely by reason of such proceeding. The Alien Property Custodian shall treat all debt claims now filed with him as claims filed pursuant to this section. Nothing contained in this section shall bar any person from the prosecution of any suit at law or in equity against the original debtor or against any other person who may be liable for the payment of any debt for which a claim might have been filed hereunder. No purchaser, lessee, licensee, or other transferee of any property or interest from the Alien Property Custodian shall, solely by reason of

such purchase, lease, license, or transfer, become liable for the payment of any debt owed by the person who owned such property or interest prior to its vesting in or transfer to the Alien Property Custodian. Payment by the Alien Property Custodian to any debt claimant shall constitute, to the extent of payment, a discharge of the indebtedness represented by the claim.

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